

DISTRICT COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

ANNE KOZLOW,

Plaintiff,

v.

YOUNG BOZZO CORP., d/b/a BOZ'S  
CANE BAY BEACH BAR,

Defendant

CIVIL NO. 2002/163

TO: Jeffrey B.C. Moorhead, Esq.

Scot F. McChain, Esq.

CC: Hon. Raymond L. Finch, Chief Judge & Law Clerk

ORDER DENYING DEFENDANT'S MOTION TO  
QUASH SERVICE BY PUBLICATION

THIS MATTER came for consideration on Defendant's Motion to Quash Service by Publication.<sup>1</sup> Plaintiff filed a response in opposition and Defendant replied to such response.

Defendant's motion is premised upon the language of 5 V.I.C. § 112 which allows service by publication "[w]hen service of the summons cannot be made as prescribed by Rule 4 of the Federal Rules of Civil Procedure." Defendant argues that Fed. R. Civ. P. 4(h) and (e)(1) allow for service pursuant to the laws of the state (territory) in which the District Court is located and that 13 V.I.C. § 348 provides that when a corporation cannot be served through a person authorized to receive service, service may be made upon the Lieutenant Governor. Defendant cites *Kalik*

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1. A related Motion to Dismiss is pending.

*Enterprises, Ltd. v. Seaboard Industries*, 20 V.I. 383, 387 (DVI 1983) in support of such argument.

In her response, Plaintiff argues only that Defendant was personally served on August 16, 2003.

Plaintiffs' First Amended Complaint was filed on November 21, 2002, On November 22, 2002, Plaintiff noted dismissal of Defendants John Wessel and Vickie Burge. On March 24, 2003, the Court noted that Plaintiff had not yet provided proof of service on Defendant [Fed. R. Civ. P. 4(l) and (m)] and ordered that by April 4, 2003, Plaintiff show cause why the matter should not be dismissed without prejudice as provided in Rule 4(m). On March 27, 2003, Plaintiff moved for substituted service by publication pursuant to 5 V.I.C. § 112(a)(4) and provided Plaintiff's attorney's declaration that a process server made diligent but unsuccessful efforts to locate the corporation's resident agent. Based thereon, the Court ordered that Plaintiff make service by publication of the summons in the St. Croix Avis once a week for four consecutive weeks. Plaintiff's Motion for Default filed July 23, 2003, included proof of such publication from May 30, 2003 to June 20, 2003. Pursuant to correspondence appended to Plaintiff's Motion for Default, Plaintiff's attorney had subsequent contact with an insurer for Defendant. The Order on Plaintiff's Motion for Entry of Default dated July 23, 2003

recognized such contact and allowed time for responsive pleading by Defendant.

Fed. R. Civ. P. 4(h) & (e)(1) direct that a Virgin Islands domestic corporation may be served pursuant to the laws of the Virgin Islands. Rule 28(b) of the Rules of the Territorial Court provides circularly that the summons and process shall be served in the same manner as required to be served by Rule 4 of the Federal Rules of Civil Procedure. Title 5 Chapter 7 of the Virgin Islands Code heralds itself, "Commencement of Actions; Service of Process," but contains little direction regarding how service is to be made. Section 111 thereof provides for service of an infant or incompetent person. Section 112(a) allows service by publication "when service of the summons cannot be made as prescribed in Rule 4 of the Federal Rules of Civil Procedure, and the defendant after due diligence cannot be found within the Virgin Islands, and when that fact appears by affidavit to the satisfaction of the District Court..., and it also appears that a cause of action exists against the defendant..., the court shall grant an order that the service be made by publication of the summons in any of the following cases:..." [emphasis added], (enumerating thereafter six cases only one of which is conceivably applicable hereto, "... (2) when the Defendant, being a resident of the Virgin Islands, has

departed therefrom with intent to defraud his creditors or to avoid the service of the summons, or with like intent keeps himself concealed therein or has departed from the Virgin Islands and remained absent therefrom six consecutive weeks...").

Defendant makes no argument that Plaintiff's claims against Defendant do not qualify pursuant to the enumerated restrictions of § 112(a) and the Court finds that the declaration of Plaintiff's attorney that accompanied Plaintiff's March 27, 2003 Motion for Substituted Service reasonably encompasses the conduct specified in 5 V.I.C. § 112(a)(2).

In *Kalik*, 20 V.I. at 387 the Court held that it was error to direct service pursuant to § 112 because (traditional) service could have been made under Rule 4 of the Federal Rules. In this matter Defendant contends that service by publication was invalid because Federal Rule 4(e)(1) allows for service pursuant to territorial law (*i.e.* service on the Lt. Governor pursuant to 13 V.I.C. § 1348). 13 V.I.C. § 1348 provides, "in case legal process against a corporation cannot by due diligence be served upon any person authorized to receive it, such process, including the complaint, may be served in duplicate upon the Lieutenant Governor, which service shall be effectual for all purposes of law. Within two days after service upon the Lieutenant Governor, he shall notify the corporation thereof by letter directed to the

corporation at its last registered office..." The Court notes that such provision is not likely to provide actual notice to Defendant and in fact Plaintiff's process server was unable to locate Defendant's Resident Agent at any listed addresses. Defendant having in fact received notice of this suit via publication now argues that instead of receiving such notice, he would have preferred to have service likely deadended at the Lieutenant Governor's Office but nevertheless "effectual for all purposes."

Upon consideration, the Court finds that the service contemplated by 13 V.I.C. § 1348 is generally unlikely to provide notice to a corporate Defendant whose resident agent could not be located by an experienced process server and accordingly is not the type of service contemplated by Fed. R. Civ. P. 4(e)(1) such that it would invoke the exclusionary provision of 5 V.I.C. § 112(a) and negate service by publication (which is likely to provide actual notice to a Virgin Island corporate defendant). In any event, pursuant to Fed. R. Civ. P. 4(m), the Court has authority upon good cause shown to extend the time for service. The Court finds that under all circumstances herein, Plaintiff has shown good cause, and accordingly the Court also extends the time for service through August 16, 2003, the date on which Thomas Bozzo was personally served per exhibit to Plaintiff's

response to this motion.<sup>2</sup>

Accordingly, it is hereby;

**ORDERED** that Defendant's Motion to Quash Service by  
Publication is DENIED.

ENTER:

Dated: August 29, 2003

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JEFFREY L. RESNICK  
U.S. MAGISTRATE JUDGE

ATTEST:  
WILFREDO MORALES  
Clerk of Court

By: \_\_\_\_\_  
Deputy Clerk

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2. The broader provisions for methods of service provided by 5 V.I.C. § 4911(a) appear restricted to out of territory service, i.e. "when the law of this territory authorizes service outside this territory, the service, when reasonably calculated to give actual notice, may be made..." (emphasis added). To the extent such phrase "the service" also includes local service in cases where the Virgin Islands law [5 V.I.C. § 4903(a)] authorizes service outside the territory, Plaintiff's publication service would also be good pursuant to § 4911(a)(5) [as directed by the Court).